the part performance itself which affords jurisdiction, and cognizance may be taken of transactions in which the relations of the parties would be purely legal save for the absence of the requisite writing. It is clear that this is the true ground for jurisdiction in cases of gifts, leases, and assignments.[16] Confusion has been caused, however, by the two-fold origin of the doctrine of part performance.[17] Thus some courts refuse relief unless there is both an unequivocal act and an irreparable change of position,[18] though proof of each of these facts should be necessary only upon a theory entirely distinct from that requiring proof of the other. The Oklahoma court seems to have been led astray by this confusion. Although a court of equity should acquire jurisdiction over the assignment of a lease only on the constructive fraud theory, relief was granted to the plaintiff upon proof of a mere entry into possession by the assignee of the lease. The plaintiff had in no way changed his position, and therefore the court must obviously have considered that the efficacy of the "part performance" depended upon its value as evidence, in a case where the application of the doctrine should logically be based only upon constructive fraud.[19]

ESTOPPEL OF A MUNICIPAL CORPORATION BY RECITALS IN ITS BONDS.—Out of the mass of litigation that has arisen from an investor's reliance upon recitals in bonds and a subsequent repudiation by a municipality of such obligations, there has evolved a well established and uniformly applied principle: that inasmuch as an estoppel can be invoked only by a *bona fide* purchaser without notice,[1] a municipality can never be estopped to deny the existence of legislative authority to issue bonds.[2] For while a purchaser is not necessarily charged with knowledge of the happening of a condition precedent to the exercise of duly conferred power, he is bound to know the law which confers authority, though its exercise be based upon a contingency.[3] Moreover, if a municipality could confer power upon itself by a recital that it had such power, the constitutional limitation upon the power of a municipal body, that it may incur indebtedness only when authorized by the legislature, would be rendered illusory and ineffectual.[4] The absence or unconstitutionality of a statute authorizing its creation, therefore, is always available as a defense in an action to enforce the payment of a municipal indebtedness.[5]

On this principle the courts agree, but several of the state courts refuse to distinguish between a total lack of power and the absence

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[16]See Burkholder *v.* Ludlam *supra;* Freeman *v.* Freeman *supra.*

[17]See 6 COLUMBIA LAW REVIEW 524.

[18]Hart *v.* Carroll (1877) 85 Pa. 508; see 4 COLUMBIA LAW REVIEW 294.

[19]See Burns *v.* Daggett *supra;* Welsh *v.* Schuyler *supra;* Ann Berta Lodge *v.* Leverton (1875) 42 Tex. 18; 1 Tiffany, Landlord & Tenant, 258, 955, 974 *n.*

[1]See Stow *v.* Montgomery (1883) 74 Ala. 226.

[2]Commissioners *v.* Call (1898) 123 N. C. 308; South Ottawa *v.* Perkins (1876) 94 U. S. 260.

[3]See Coloma *v.* Eaves (1875) 92 U. S. 484.

[4]2 Dillon, Municipal Corporations, (5th ed.) § 933.

[5]2 Dillon, Municipal Corporations, (5th ed.) § 961; Litchfield *v.* Ballou (1884) 114 U. S. 190.

of certain conditions precedent to the exercise of the power.[6] The better view, however, would seem to be that where power exists, but its exercise is forbidden until the happening of a certain contingency, or the performance of certain conditions precedent, a recital in the bond that the contingency has arisen, or that the conditions precedent have been performed, may estop the municipality to deny these facts.[7] This estoppel arises only if the officers who make the recital are constituted a tribunal by the legislature to determine, not only as a ground for their own action but as final and authentic information for the public, when the requirements of the statute have been complied with.[8]

The question, then, of prime importance to the prospective buyer is whether the legislature has authorized the municipal officers to determine conclusively the facts recited in the bond. The answer to this is to be found in a consideration of the purpose of the issue and the nature of the facts upon which the power to make it is conditioned. Thus, if a statute confers power upon a municipality to issue bonds, but conditions the issue upon the procurement of an assenting vote, or the written consent of a certain proportion of the taxpayers, there can be no implication that the legislature intended to impose upon a prospective buyer the burden of ascertaining by independent inquiry and decision the regularity of the election, or the genuineness of the consenting signatures.[9] The imposition of such a task would defeat the purpose of the issue; the market value of the bonds would be greatly diminished and their salability impaired. Under such circumstances, it cannot be doubted, that a purchaser would be justified in relying upon a recital in the bonds that all conditions precedent have been performed.[10]

On the other hand, where the constitution or statute authorizing the bond issue does not leave it to the municipal officers to ascertain whether the condition precedent has been complied with, but refers to some definite public record as a test of this fact,[11] the purchaser is put on notice that authority to act depends upon the existence of the requisite fact as shown by the record, and that the municipal officers have no power to determine its existence.[12] An application of the above

[6]Carpenter *v.* Lathrop (1873) 51 Mo. 483; Starin *v.* Genoa (1861) 23 N. Y. 439; see opinion of Napton, J., in Smith *v.* County of Clark (1873) 54 Mo. 58; and *cf.* People *v.* Mead (1867) 36 N. Y. 224.

[7]Hughes County *v.* Livingston (1900) 104 Fed. 306; Cumberland County *v.* Randolph (1893) 89 Va. 614; Nat. Life Ins. Co. *v.* Board of Education (1894) 62 Fed. 778.

[8]Independent School Dist. *v.* Rew (1901) 111 Fed. 1; Lane *v.* Embden (1881) 72 Me. 354.

[9]Knox County *v.* Aspinwall (U. S. 1858) 21 How. 539; Bissell *v.* Jeffersonville (U. S. 1860) 24 How. 287; Venice *v.* Murdock (1875) 92 U. S. 494; Fulton *v.* Riverton (1890) 42 Minn. 395; *contra,* Starin *v.* Genoa *supra;* Cogwin *v.* Hancock (1881) 84 N. Y. 532.

[10]Venice *v.* Murdock *supra.*

[11]Dixon County *v.* Field (1883) 111 U. S. 83; see Marcy *v.* Oswego (1875) 92 U. S. 637; Hopper *v.* Covington (1881) 8 Fed. 777.

[12]If the bonds fail to show an excess from a comparison with the test prescribed, the investor has been allowed to rely upon the recital that the debt limit has not been exceeded. Chaffee *v.* Potter (1892) 142 U. S. 355; Gunnison County Com'rs. *v.* Rollins (1898) 173 U. S. 255. This would seem to be an unwarranted extension of the estoppel theory, since where the statute prescribes a test, the recital by the municipal officers is unauthorized. Dixon County *v.* Field *supra;* Lake County *v.* Graham (1889) 130 U. S. 674; Sutliff *v.* Lake County (1892) 147 U. S. 230.

principles is to be found in the recent case of *Town of Aurora* v. *Hayden* (Colo. 1912) 126 Pac. 1109. The legislature had authorized the town of Aurora to issue bonds, but provided that no loan should be made except by ordinance. The bonds recited that they were issued in pursuance of an ordinance, but this was in fact void for lack of publication. It was held that as this defect was a matter of public record to which the statute referred, the recital that the issue was in pursuance of an ordinance passed by the trustees was unauthorized and did not estop the municipality to deny the validity of the ordinance.[13] While this decision is sound on principle, it is doubted if it would be upheld in the federal courts, inasmuch as a late decision held that a recital in a bond that an ordinance conformed to the statute, though in fact it did not, relieved the purchaser of the duty to examine the ordinance.[14]

RIGHT OF A MINORITY STOCKHOLDER TO ENJOIN A VIOLATION OF THE SHERMAN ANTI-TRUST ACT.—It is one of the basic principles of corporation law that a corporation and its officers occupy a fiduciary relationship to the stockholders, and therefore equity will interfere on behalf of a minority stockholder to prevent any breach of that relation.[1] The stockholders, however, are ordinarily in no sense fiduciaries, and may, in the absence of actual fraud to the extent of dividing corporate assets among themselves to the exclusion of a minority,[2] act in subservience of their own personal interests, regardless of incidental injury to the company or their fellow-stockholders.[3] It is to be presumed that the interests of the corporation and of its shareholders are identical, and equity will not interfere in the internal corporate management to question the wisdom of a course pursued at the election of the majority stockholders.[4]

The situation is regarded as different, however, when a number of stockholders combine in order to control the corporation, or when another company secures control through the purchase of stock. In such a case it is held that the second company becomes for all practical purposes the corporation of which it holds a majority of stock, and assumes the same fiducial relation towards the minority stockholders that a corporation itself usually bears to its stockholders.[5] Clearly there can be no presumption that the interests of the corpora-

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[13] *Accord,* National Bank *v.* Granada (1893) 54 Fed. 100; Swan *v.* Arkansas City (1894) 61 Fed. 478.

[14] Evansville *v.* Dennett (1895) 161 U. S. 434; see Haskell County *v.* Nat. Life Ins. Co. (1898) 90 Fed. 228.

[1] 1 Pomeroy, Equitable Remedies, § 305; 2 Machen, Corporations, § 1142 *et seq.*

[2] Mumford *v.* Ecuador Co. (1901) 111 Fed. 639, 643; Lowe *v.* Pioneer etc. Co. (1895) 70 Fed. 646; Tillis *v.* Brown (1908) 154 Ala. 403.

[3] Windmuller *v.* Standard Co. (1902) 114 Fed. 491; Colgate *v.* U. S. Leather Co. (N. J. 1907) 67 Atl. 657; Hanchett *v.* Blair (1900) 100 Fed. 817; Rothschild *v.* Memphis etc. Co. (1902) 113 Fed. 476. But a contract to sell the voting power is void. 9 COLUMBIA LAW REVIEW 357; Bias *v.* Atkinson (W. Va. 1909) 63 S. E. 395.

[4] 2 Machen, Corporations, § 1301; 1 Morawetz, Corporations, § 272 *et seq.*

[5] 2 Cook, Corporations, § 662; Wheeler *v.* Nat. Bk. Bldg. Co. (1908) 159 Fed. 391; Farmers' L. & T. Co. v. Ry. (1896) 150 N. Y. 410; George *v.* Central etc. Co. (1893) 101 Ala. 607.